In The
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION, PETITIONER

v.

JEFFERSON LINES, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Oklahoma may constitutionally impose on the in-state purchaser, and require the in-state vendor to collect, a sales tax on the purchase of bus transportation sold within the State, measured by the full purchase price of the ticket, even though the ultimate destination or a portion of the route to be travelled extends beyond the state's borders.

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Petitioner, State of Oklahoma, ex rel. Oklahoma Tax Commission, respectfully prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 21, 1994.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *State of Oklahoma ex rel. Oklahoma Tax Commission v. Jefferson Lines, Inc. (In*

re Jefferson Lines, Inc.), 15 F.3rd 90 (8th Cir. 1994), and is reprinted in the Appendix hereto, at A-1.

The Memorandum and Order of the United States District Court for the District of Minnesota, Third Division, has not been reported. It is reprinted in the Appendix hereto, at A-9. The Order of the United States Bankruptcy Court for the District of Minnesota, Third Division, is not reported and is reprinted in the Appendix at A-17.

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was entered on January 21, 1994. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * *

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;

OKLA. STAT. tit. 68, § 1361 (Supp. 1988):

(A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a cor-

poration, each principal officer thereof, shall be personally liable for said tax.

STATEMENT OF THE CASE

1. Nature of the Controversy

The Oklahoma Sales Tax Code imposes a tax, to be paid by the purchaser and collected by the vendor, upon the sale of tangible personal property and certain services, including transportation for hire by common carriers such as bus companies, where such sales occur within the State. The vendor becomes liable if the vendor fails to collect or remit the tax. OKLA. STAT. tit. 68, §§ 1354(1), 1361 (Supp. 1988).

Jefferson Lines, Inc. ("Jefferson") is a common carrier providing bus service in Oklahoma as well as other states. Jefferson sells tickets in Oklahoma from various locations across the state. Jefferson's ticket sales can be classified into two categories. The first category consists of tickets sold in Oklahoma for transportation that both originates and terminates within the State of Oklahoma. The second category consists of tickets sold in Oklahoma for transportation originating in Oklahoma and terminating in some other state.

During the periods in question, Jefferson collected and remitted the Oklahoma sales tax only on ticket sales involving solely intrastate travel. Jefferson reported total sales made in Oklahoma on its

Oklahoma sales tax report. Jefferson then deducted all sales where the ultimate destination was outside the State of Oklahoma. Taxes were not collected or remitted on those sales. The Oklahoma Tax Commission, conducting a routine office audit of Jefferson's sales tax reports for September and October, 1989, and January and February, 1990, discovered Jefferson was not collecting or remitting tax on sales made in Oklahoma where the bus routes involved travel outside the State. The Commission disallowed the sales deduction taken by Jefferson on its sales tax reports and determined the amount of sales tax due on the deducted sales.

2. The Proceedings Below

Jefferson filed its petition for voluntary relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota, Third Division, on October 27, 1989. On relation of the Tax Commission, the State of Oklahoma filed proofs of claim for priority taxes and administrative claims for the sales taxes that Jefferson, as vendor, was required to collect, but did not, on the bus tickets sold in Oklahoma. The bankruptcy court's jurisdiction to hear and decide those claims is provided by 28 U.S.C., § 157.

Following Jefferson's objection to the Commission's claims, the bankruptcy court issued its order disallowing the Commission's claims for sales taxes due on the sale of transportation where the ultimate bus route involved a destination outside the State,

based upon the court's conclusion that such taxes violated the Commerce Clause of the United States Constitution.

On appeal, the district court affirmed. That court, examining the tax in light of *Complete Auto Transit, Inc. v. Brady*, 403 U.S. 274 (1977), concluded that, while Oklahoma was the only state that could tax the *purchase* of the bus tickets in question and the tax was therefore internally consistent, the court also concluded that because the tax is not apportioned according to the miles traveled in Oklahoma, it was not externally consistent, and therefore not "fairly apportioned," thus violating the Commerce Clause.

The Eighth Circuit affirmed the district court, concluding Oklahoma's sales tax was equatable to the tax at issue in *Central Greyhound Lines v. Mealy*, 334 U.S. 653 (1948) and, therefore, Oklahoma had to apportion its tax based on bus miles traveled in Oklahoma.

REASONS FOR GRANTING THE WRIT

THE OPINION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND THE OKLAHOMA SUPREME COURT, WHICH HAVE UPHELD THE STATES' POWER TO TAX A DISCRETE TRANSACTION WHICH OCCURS SOLELY WITHIN THE STATE'S BORDERS.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), this Court set forth the test for determining whether a state tax improperly impedes Congress' authority to regulate commerce between the states. Under the four-prong test of *Complete Auto*, a state tax is constitutional if: (1) the tax is related to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Id.*, at 279, 97 S.Ct. at 1079.

In *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) the Court said that to determine whether a tax is fairly apportioned it must be examined for internal and external consistency. To be internally consistent, a tax "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." The external consistency test "asks whether

the State has taxed only that portion of the revenues from [an] interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.*, at 262.

The Opinion below correctly concluded that Oklahoma's sales tax on the in-state sale of bus tickets satisfied the internal consistency test. However, the Eighth Circuit then concluded that the tax failed the external consistency test. In doing so, however, the court erroneously equated Oklahoma's sales tax, imposed solely on the in-state purchaser, with the gross income tax imposed on the bus company in *Central Greyhound Lines v. Mealy*, 334 U.S. 653 (1948), and based its decision entirely upon that case. The court, however, completely disregarded this Court's *applicable* decisions in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095 (1993); and *Goldberg*.

Central Greyhound is totally inapposite to this case, and was wrongly relied upon by the courts below. That case involved an *income* tax on the bus company's gross proceeds or total revenues, while the case at bar involves a *sales* tax on the consumer, *measured by* the amount of the purchase. Central Greyhound conducted bus routes that ran primarily in New York but crossed into New Jersey and Pennsylvania for a short period. New York imposed an income tax on the bus company. The amount of

tax due was based on the bus company's gross receipts or total income earned. This Court stated the tax was improper because part of the bus company's income was generated by bus routes occurring outside New York. In essence, New York was attempting to collect income tax on income generated outside the state. This case, however, involves a sales tax on the consumer—not an income tax on the bus company. Oklahoma's only requires that Jefferson *collect* the tax from its Oklahoma consumer. Jefferson became liable only because it failed to collect the tax.

The Oklahoma Supreme Court in interpreting Oklahoma sales tax has determined that the taxable event is the sale itself, and that the sales tax is applicable only when the sale occurs in Oklahoma. *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 10 (Okla. 1976). The Oklahoma Court has further said that the sales tax is not a tax on property (the thing purchased) or a tax on income. *Oklahoma Tax Commission v. Sisters of The Sorrowful Mother*, 97 P.2d 888, 892 (Okla. 1940).

Unlike the gross income tax in *Central Greyhound*, levied on the company's revenues from activities conducted in other states, Oklahoma's sales tax is levied on the consumer, and is imposed solely with respect to that consumer's activity *within* the State.

The Oklahoma Supreme Court in *Koch Fuels v. State ex rel. Tax Comm'n*, 862 P.2d 471 (Okla. 1993), analyzed Oklahoma's sales tax under the *Complete*

Auto test in the face of a Commerce Clause challenge raising many the same arguments as made here, and, insofar as pertinent hereto,[1] found those statutes constitutional. The well-reasoned opinion of the Oklahoma Court studiously follows, and is completely consistent with, the applicable pronouncements of this Court. *Koch Fuel* involved the sale of fuel oil, with the contract between the parties designating Tulsa, Oklahoma as the point of delivery of the fuel. The fuel was actually delivered outside the State of Oklahoma at various points along an interstate pipeline. The Oklahoma Court reasoned that because a sale is an insular and discrete transaction that can occur only in one place, the sale is taxable only by the state in which it occurs.

Likewise, this Court has traditionally viewed local sales taxes favorably in the face of Commerce Clause challenges. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), the tax at issue was a New York City sales tax imposed on the sale of goods. New York City levied a tax on the consumer that was collected by the retailer at the time of the

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[1] The Oklahoma court did find that a statutory exemption from sales tax on goods manufactured in Oklahoma and transported to another state discriminated against interstate commerce, and vacated the tax assessment for that reason, in that case only. That element is not present in the case before this Court. Further, having struck down that particular exemption, the court ruled that, thereafter, there was and would be no constitutional impediment to imposition of the tax in the same type of case. 862 P.2d at 481.

sale. In *McGoldrick*, a Pennsylvania corporation maintaining a sales office in New York entered into a contract with a New York buyer for the sale of coal. The coal was mined in Pennsylvania and shipped to New York through channels of interstate commerce. The coal was not shipped until the parties entered into the sales contract. The seller challenged the New York City sales tax, alleging it infringed upon the Commerce Clause due to the fact the goods were shipped through interstate commerce following the sale. This Court held the New York City sales tax valid because the practical effect of the tax did not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved. *Id.*, at 54, 57-58.

The economic effect of Oklahoma's sales tax is identical to the economic effect of the New York City sales tax in *McGoldrick*. Regardless of the subsequent interstate bus route, it is the *sale* of transportation which creates the taxable transaction. The sale of transportation occurs solely in Oklahoma. This Court has stated that the *taxable transaction* determines if a state tax improperly infringes the Commerce Clause. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 95 S.Ct. 1538, 44 L.Ed.2d (1975). Oklahoma's sales tax is levied on the *sale* of transportation and not on the interstate bus route; for that reason, it passes external consistency.

In *Goldberg* the State of Illinois imposed a 5% tax on intrastate telecommunications and also on interstate telecommunications originating or terminating in the state and charged to an Illinois service address, regardless of where the telephone call was billed or paid.

In upholding the Illinois tax under the four-prong test of *Complete Auto*, the Court held that the tax was internally consistent for apportionment purposes, because "if every State taxed only those interstate phone calls which are charged to an in-state service address, only one state would tax each interstate call." *Id.*, 488 U.S. at 261. Here, the same holds true. If every state levied a tax on the sale of bus tickets within the state, only one state could tax each sale. *See, also, Koch Fuels*, 862 P.2d at 479.

As to external consistency, the Court likewise upheld the tax, rejecting the argument that a tax on the gross charge was not fairly apportioned and could likely result in multiple taxation, saying:

> The Director argues that, *because the Tax Act has the same economic effect as a sales tax*, it can be based on the gross charge of the telephone cal. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 53, 58, 60 S.Ct. 388, 398 (1940) (sales tax); cf. *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31-32, 108 S.Ct. 1619, 1623-1624, 100 L.Ed.2d 21 (1988) (use tax); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232,

> 251, 107 S.Ct. 2810, 2822, 97 L.Ed.2d 199 (1987) (gross receipts).
>
> We believe that the Director has the better of this argument. *The tax at issue has many of the characteristics of a sales tax.* It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, *cf. McGoldrick, supra*, 309 U.S., at 58, 60 S.Ct. at 398, the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls.

Goldberg, 488 U.S. at 262. [Emphasis added.]

Because of the structure of the Illinois tax statute which levied the tax without regard to where a call is billed or paid, the Court reasoned that two states—but only two—could tax the same call: the state in which the customer's service address is located and the state where the call is billed or paid. The Court then held that "[t]his limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." *Id.*, at 263-64. The Court in *Goldberg* did observe that to the extent that some other state *might* tax the same call, Illinois' credit provision operated to avoid multiple taxation. *Id.*, at 264, 109 S.Ct. at 590. However, nowhere in *Goldberg* did the Court say that *only* a taxing scheme that provided for such credits could

survive the test of constitutionality. It is axiomatic that where there is *no* possibility of multiple taxation, there is no need for credit provisions. *See, Koch Fuels*, 862 P.2d at 478-479.

The tax at issue here does not merely have "many of the *characteristics* of a sales tax," it *is* a sales tax. It is applied to a retail purchase that is a purely local event. Differing from—and more localized than—the telephone calls in *Goldberg*, the purchase of a bus ticket in Oklahoma does not trigger simultaneous activity in several states, or even in one other state. Here the sale is complete, and taxable, before any transportation of any kind occurs—*or even if no transportation occurs at all.* Travel is not the taxed activity. A bus ticket need not be used for its sale to be taxable.

In like vein, this Court has approved, for Commerce Clause purposes, state sales taxes on sales of goods subsequently used solely in interstate or foreign commerce. In *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), Florida imposed a state sales tax on all aviation fuel sold within the state. The jet fuel was used in intrastate, interstate and foreign transportation. There, the Court accepted that the sale of fuel was a discrete transaction that could occur in only one location, that no threat of multiple taxation could exist, and that the tax did not contravene the Commerce Clause. *Id.*, at 8–9.

In *Itel Containers International Corporation v. Huddleston*, 507 U.S. _____, 113 S.Ct. 1095 (1993),

Tennessee levied a sales tax on the lease in Tennessee of cargo containers which were used solely in foreign commerce. The Court upheld the Tennessee Supreme Court's finding that the state sales tax clearly met the *Complete Auto* four-prong test. 113 S.Ct. at 1104. The Court found the Tennessee sales tax to be "a fair measure of the state's contacts with a given commercial transaction in all four aspects of the *Complete Auto* test." *Ibid.* Justice Scalia, in his concurring opinion, stated the Tennessee tax to be "nothing more than a garden-variety sales tax that clearly does not discriminate against foreign [or interstate] commerce." *Id.*, at 1107 (Scalia, J., concurring).

The Oklahoma sales tax is a "garden-variety" sales tax: It is assessed on the individual consumer, collected by the retailer, accompanies the retail purchase of a bus ticket, and reasonably reflects the way that consumers purchase bus tickets—in a single, discrete event—all as recognized and upheld in *McGoldrick, Goldberg, Itel Containers, Wardair* and *Koch Fuels*. The lower court's finding to the contrary, based upon a mischaracterization of the tax as one on interstate transportation or use *after the sale*, is contrary to the applicable decisions of this Court, and should be reviewed and reversed.

CONCLUSION

Because the Eighth Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court and of

the highest Court of the State of Oklahoma, review by this Court is urgently required. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1684MN

In re Jefferson Lines, Inc.,	*	
	*	
Debtor;	*	
	*	On Appeal
State of Oklahoma ex rel.	*	from the
Oklahoma Tax Commission,	*	United States
	*	District Court
Appellant,	*	for the District
v.	*	of Minnesota.
Jefferson Lines, Inc.,	*	
	*	
Appellee.	*	

Submitted: November 11, 1993
Filed: January 21, 1994

Before RICHARD S. ARNOLD, Chief Judge, BEAM, Circuit Judge, and JACKSON[1], District Judge.

RICHARD S. ARNOLD, Chief Judge.

[1] The Hon. Carol E. Jackson, United States District Judge for the Eastern District of Missouri, sitting by designation.

In 1989, the Oklahoma Tax Commission sought payment from Jefferson Lines, Inc., the debtor in a Chapter 11 bankruptcy proceeding, for unpaid sales tax on the gross price of interstate bus tickets sold in Oklahoma. The State law, Okla. Stat. Title 68, § 1354(1)(C), requires Jefferson to collect and remit sales tax on the gross price of every bus ticket sold in Oklahoma.[1] The statute applies to the sale of all tickets sold in Oklahoma, regardless of where the trip begins or ends. Jefferson is a bus line providing transportation service for both intrastate and interstate travel. Jefferson objects to paying the sales tax for the miles travelled outside of Oklahoma, arguing that the sales tax violates the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

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1 The relevant part of Okla. Stat. Title 68, § 1354 (Supp. 1988), states:

> (1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 *et seq.* of this title, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:
>
> * * *
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

The Bankruptcy Court[2] agreed with Jefferson. The District Court[3] affirmed. So do we.

A state tax on interstate commercial activity violates the Commerce Clause unless it "is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services or benefits provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). If a tax statute fails to meet any of these four standards, the statute will offend the Commerce Clause. See *Goldberg v. Sweet*, 488 U.S. 252 (1989). Both the District Court and the Bankruptcy Court held the statute was not fairly apportioned, thus failing the second standard of *Complete Auto*. We begin our inquiry by examining the issue of apportionment.

To determine whether a tax is fairly apportioned a court must ask whether the tax is both "internally" and "externally consistent." *Goldberg*, 488 U.S. at 261. The purpose of this inquiry "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61.

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2 The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

3 The Honorable Donald D. Alsop, Senior United States District Judge for the District of Minnesota.

For a tax to be internally consistent, it "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.*, at 261. The purpose of this inquiry "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61.

For a tax to be internally consistent, it "must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.*, at 261. The Oklahoma tax meets this test. As noted by the District Court and the Bankruptcy Court, an individual bus ticket can be sold in only one state. Therefore, even if every state taxed bus tickets sold within its borders, for all transportation originating within that state, no customer would be taxed more than once. Thus, the Oklahoma tax is internally consistent.

But is the Oklahoma tax externally consistent? "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. When we evaluate the arguments, we must look beyond formalism and consider the practical and economic effect on the tax on interstate commerce. *Id.* at 264; see also *Central Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 659-60 (1948).

The Commission contends that the tax is externally consistent and does not need to be apportioned because the tax is on the sale of the ticket and therefore is imposed only on local activity. To defend the assertion that only the sale of the ticket is taxed and not the use of the ticket, the Commission explains that the Oklahoma sales tax is based solely on the purchase price of the ticket, and that once the sale has occurred, the taxable event is complete. In essence, the Commission argues that the taxable activity is the sale of a ticket, not of transportation. This argument is too technical and flies in the face of how bus-ticket prices are set. A ticket price is set, at least partially, on the number of miles travelled. To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which is represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

Both courts below relied, correctly we think, on *Central Greyhound Lines, Inc. v. Mealy*, *supra*. In this 1948 case, New York levied a gross-receipts tax on a New York-based bus company. All of the company's revenues were subject to the tax, even though they included large sums attributable to transportation services performed in New Jersey. The Supreme Court held the tax invalid because it was not appor-

tioned as between intrastate and interstate transportation revenues. The Court said that "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of local government whose protection it enjoys.'" 334 U.S. at 663 (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)). The vice of the New York gross-receipts tax was that "it [laid] 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State a part of every dollar received in such transactions.'" *Central Greyhound*, 334 U.S. at 663 (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297 (1917)) (citations omitted).

The same thing is true here. By levying a sales tax on the total price of tickets for interstate transportation, Oklahoma is attempting to tax the gross receipts from the sale of transportation outside its borders. It is taxing more than the instate component of the interstate activity. If a customer, for example, buys a ticket in Tulsa, Oklahoma, to travel from Tulsa to Nashville, Tennessee, most of the trip will occur outside of Oklahoma. Under the scheme urged by the Commission, Oklahoma receives tax revenues attributable to the entire trip, even though its bears none of the cost of repairing roads in Arkansas, nor does it provide any police or fire protection for miles travelled in Tennessee. Like the New York tax in issue in *Central Greyhound*, the Oklahoma sales tax is a direct burden on every transaction in interstate

commerce, and the amount of the burden bears no relationship to the portion of the trip that occurs within the taxing state.

The Commission suggests that *Central Greyhound* is distinguishable, because the tax there was a gross-receipts tax, formally levied upon the seller, whereas here a sales tax is involved, formally levied on the buyer, though collected by the seller and remitted to the State by it. The distinction is not significant enough to bear the weight that the Commission seeks to place upon it. Sales taxes and gross-receipts taxes have much in common. They are both measured by the gross receipts of the bus company, and are due whether the company makes a profit or not, and regardless of the cost to it of rendering the transportation service represented by the ticket sold. A gross-receipts tax is obviously an important part of the bus company's cost of doing business. The likelihood that it will be passed on to the customer, in whole or in part, is great, if the company expects to continue in business. Conversely, a sales tax, though in form levied upon the buyer of the ticket, has to be paid by the bus company whether it collects the tax from its customers or not. The bus company must remit the tax to the state whether or not it has added the tax to the price of the ticket as such. Okla. Stat. Title 68, § 1361(A) (Supp. 1988). In both situations, the amount of the tax varies directly with the amount of miles travelled, whether those miles are inside the taxing state or outside. This is a classic instance of

an unapportioned tax, in our view. *Central Greyhound* was decided before the adoption of the presently applicable four-part analysis by the *Complete Auto* Court, but we believe that the reasoning of *Central Greyhound* is still good when considering whether a tax is externally consistent as that term is used in *Complete Auto*.

The unapportioned Oklahoma sales tax on interstate travel is not externally consistent when applied to bus tickets bought in Oklahoma for travel to another state. Apportioning the tax in accordance with the miles travelled within the state does not present insurmountable administrative burdens, nor is it technologically unfeasible for any reason. *See Goldberg*, 488 U.S. at 264. Therefore, this tax fails the apportionment standard of *Complete Auto*. Because the tax is not fairly apportioned, it is unnecessary to examine any of the other *Complete Auto* factors to hold that the tax violates the Commerce Clause. Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

JEFFERSON LINES, INC.,
Debtor.

STATE OF OKLAHOMA, EX REL. OKLAHOMA TAX COMMISSION,
Appellant,

v.

JEFFERSON LINES,INC., and WESLEY B. HUISINGA, UNITED STATES TRUSTEE,
Appellees.

Civ No. 3-92-467

MEMORANDUM AND ORDER

[Filed Dec. 22, 1992]

The State of Oklahoma appeals the bankruptcy court's[1] upholding of Jefferson Lines Inc.'s objection to the Oklahoma Tax Commission's claims for unpaid

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[1] The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

sales taxes. For reversal, Oklahoma argues that the levy of this sales tax on the gross sale price of interstate bus tickets sold in Oklahoma does not violate the Commerce Clause of the United States Constitution. The Court affirms.

I. BACKGROUND

The parties stipulate to the facts and to the legal issue in this case. Jefferson provides bus service in Oklahoma on both intra- and interstate routes. Jefferson filed for bankruptcy protection in the District of Minnesota in 1989. In response, the Commission filed several proofs of claims, all of which relate to tickets sold in Oklahoma for travel from Oklahoma to a destination in another state.

According to the Commission, Okla. Stat. tit. 68, § 1354(1)(C) (1991) required Jefferson to collect and remit a sales tax on the gross price of every bus ticket it sold in Oklahoma, regardless of what state the trip originated or terminated in. In remitting its taxes for the relevant periods, however, Jefferson deducted from its total sales the amount attributable to the sales of interstate tickets. When the Commission submitted its proofs of claims with respect to these amounts, Jefferson objected. The parties stipulated that the legal issue before the bankruptcy court was "Under the Oklahoma Statute 68 O.S. § 1354(C) may the State of Oklahoma assess and collect a sales tax on tickets sold in Oklahoma where the trip originates in Oklahoma and terminates in a state other than Oklahoma?" By an order dated May 13, 1992, the bankruptcy court sustained Jefferson's

objections, ruling that the tax imposed by § 1354(1)(C) violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it is not fairly apportioned and because it discriminates against interstate commerce.

II. DISCUSSION

Under 28 U.S.C. § 158(A) (1988), this Court has appellate jurisdiction over final judgments and orders of the United States Bankruptcy Court for the District of Minnesota. On appeal, this Court is to review de novo the bankruptcy court's conclusions of law. *In re Muncrief*, 900 F.2d 1220, 1224 (8th Cir. 1990).

A state tax on interstate commerce does not violate the Commerce Clause if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). As Oklahoma's tax must satisfy all four prongs of the *Complete Auto* test to survive a Commerce Clause challenge, *see Goldberg v. Sweet*, 488 U.S. 252 (1989), a finding that it fails one prong would obviate the need to apply the other prongs.

The Court turns first to the apportionment prong. "[T]he central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." *Id.* at 260-61. To determine whether a tax is fairly appor-

tioned, a court must examine whether it is internally and externally consistent. *Id.* at 261.

A tax is internally consistent if no multiple taxation would result were every state to impose an identical tax. *Id.* As a bus ticket can be sold in only one state, even if every state were to tax the sale of bus tickets within its borders, no purchasers would be taxed more than once. Therefore, Oklahoma's tax is internally consistent.

A tax is externally consistent if it is levied only on "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. Oklahoma's tax on the gross purchase price of intrastate bus tickets probably reasonably reflects the relative benefit Oklahoma confers on intrastate riders in the form of highway maintenance and other such services. However, by also taxing the entire purchase price of an interstate ticket, Oklahoma receives revenues that exceed the amount reasonably attributable to the Oklahoma leg of the bus journey. Thus, Oklahoma's tax does not appear to be fairly apportioned. *See Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 662-63 (1948) (invalidating a state tax on the gross receipts of bus company when the tax was levied on the entire mileage of a bus trip although part of the trip was outside the state).

Nevertheless, Oklahoma argues that its tax is externally consistent, relying on *Goldberg*. The tax challenged in *Goldberg* was levied on the gross charge of interstate telecommunications originated or re-

ceived in Illinois and charged to an Illinois service address. *Goldberg*, 488 U.S. at 257. Illinois provided a credit to any taxpayer who was taxed by another state on a call taxed by Illinois. *Id.*

The *Goldberg* Court concluded that the Illinois tax was externally consistent because the risk of multiple taxation was slight and because apportioning a tax upon telecommunications was administratively virtually impossible. The Court concluded that the risk of multiple taxation was slight because states through which a telephone signal merely passes probably do not have a sufficient nexus to tax the call. *Id.* at 263. The *Goldberg* Court believed that only two states could have a nexus substantial enough to tax a particular interstate telephone call; a state that taxed interstate calls charged to a service address within the state, and a state that taxed interstate calls billed or paid within the state. *Id.* Thus, under the Illinois tax it was possible that a taxpayer with service and billing addresses in different states could be taxed twice on the same call. *Id.* This "limited possibility" of multiple taxation was not enough to invalidate the Illinois tax because Illinois provided for a credit in the event of multiple taxation. *Id.* at 264.

The *Goldberg* Court also found that apportioning the tax on a telephone call would "produce insurmountable administrative and technological barriers." *Id.* at 264-65. The Court noted that telephone networks offer billions of potential paths from one point to another, and that computers can switch calls rapidly and frequently from one path to

another without regard to state lines. *Id.* at 254-55. Thus, it is virtually impossible to trace and record the path of an individual call. *Id.* at 255. Accordingly, the Court held that the Illinois tax was fairly apportioned because the risk of multiple taxation was low, Illinois provided a credit in case of multiple taxation, and it is not administratively feasible to apportion taxes on telephone calls. *Id.* at 265.

Oklahoma argues that its tax is analogous to the tax in *Goldberg* under the external consistency test because Oklahoma is the only state with a sufficient nexus to tax the purchase of bus tickets. Oklahoma emphasizes that its tax is a sales tax upon the purchasers of bus tickets which "retailers" such as Jefferson collect and hold in trust for the state. Because its tax is only on the sale of tickets within the state, Oklahoma argues, no other state can impose such a tax on the same ticket. Thus, Oklahoma concludes, *Goldberg* controls and its tax, like Illinois' telecommunications tax, is externally consistent.

The *Goldberg* Court emphasized that the external consistency test "is essentially a practical inquiry." *Id.* at 264. Hence, Oklahoma describes its analysis as practical. However, Oklahoma's analysis exalts formalism over practical inquiry because it ignores a very real potential for double taxation. For example, Texas could tax Jefferson on the revenue it derived from the transportation of passengers within Texas. *See, e.g.*, *Greyhound Lines*, 334 U.S. at 662-63 (endorsing such a method of apportionment). If that were the case, a Jefferson passenger traveling from

Tulsa to Houston would effectively be taxed twice on the Texas portion of the journey. The fact that Oklahoma levies a sales tax on the ticket purchaser while Texas would levy its tax on Jefferson makes no practical difference, as Jefferson would pass the Texas tax on to the purchaser by increasing the price of the ticket. Thus, although Oklahoma may be the only state with a sufficient nexus to tax the *purchase* of a bus ticket in Oklahoma, other states still have a sufficient nexus to tax the very same activity that Oklahoma is taxing. Because the potential for multiple taxation is much higher in this case that in *Goldberg*, and because Oklahoma provides no credit in case of multiple taxation, Oklahoma's tax is quite unlike the telecommunications tax in *Goldberg*.

Oklahoma's tax also differs from the tax in *Goldberg* in that apportioning a tax on bus ticket purchasers poses no significant administrative burden. Although the *Goldberg* Court held that apportioning a tax on telecommunications was not feasible, it noted that in previous cases the Supreme Court has endorsed apportionment formulas based on the number of miles a bus, train, or truck travels with a taxing state. *Goldberg*, 488 U.S. at 264. These cases, it stated, all involved "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.* Oklahoma does not argue, nor does the Court have reason to believe, that apportioning a tax on bus travel on the basis of the

number of miles traveled within the state is impracticable.

Therefore, the Court concludes that, under the standard enunciated in *Goldberg*, Okla. Stat. tit. 68, § 1354(1)(C) (1991) is not externally consistent when applied to bus tickets purchased in Oklahoma for travel to a destination in another state. Because the Oklahoma state thus fails the apportionment prong of the *Complete Auto* test, it violates the Commerce Clause. Accordingly, the order of the bankruptcy court is AFFIRMED.

DATED: December 22, 1992.

/s/ Donald D. Alsop
DONALD D. ALSOP,
Senior Judge
United States District Court

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:	Chapter 11 Case
Jefferson Lines, Inc.,	BKY Case No. 3-89-4137
Debtor.	ORDER

This matter came before the Court on objection by Jefferson Lines, Inc. ("Debtor") to Claim Nos. 603-606 of the Oklahoma Tax Commission ("Commission") for unpaid sales tax in the consolidated amount of $46,655.15. Steven D. DeRuyter represents the Debtor. Douglas F. Price represents the Commission. The Court, having considered the briefs of the parties, and being fully advised in the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

The facts are undisputed. Debtor, a Minnesota corporation, is a common carrier providing bus service

in Oklahoma and numerous other states. Debtor sells transportation tickets within Oklahoma for both intrastate and interstate routes. "Intrastate routes" are those which originate and terminate within the State of Oklahoma. "Interstate routes" are those which originate in Oklahoma and terminate in a state other than Oklahoma.[1] The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all intrastate tickets, and to all interstate tickets sold by a common carrier for transportation originating in Oklahoma.

Debtor filed for Chapter 11 relief on October 27, 1989. While operating under Sales Tax Permit No. 246600, Debtor deducted all interstate route tickets sold in Oklahoma in computing its total taxable sales. The Commission filed claims in the Debtor's estate seeking payment of the tax on interstate route tickets sold during September and October, 1989 and January and February, 1990. The total amount in controversy

[1] Additionally, Debtor has routes which originate outside of Oklahoma and terminate within Oklahoma, and routes which originate outside of Oklahoma, pass through Oklahoma, and terminate in a state other than Oklahoma. Although these are also interstate routes, Oklahoma does not tax interstate transactions regarding transportation that does not originate in Oklahoma. Accordingly, except where specifically referenced, the term "interstate routes" in this opinion means only those interstate routes for transportation originating in Oklahoma.

is $46,659.15.[2] Debtor objects to allowance of the claims on the grounds that applying Oklahoma's sales tax to the gross receipts of tickets sold in Oklahoma for its interstate routes violates the Commerce Clause of the United States Constitution.

II.

Does the Oklahoma sales tax statute which levies a tax on the gross receipts from sales of transportation over interstate routes violate the Commerce Clause of the United States Constitution?

III.

Oklahoma collects sales tax from the Debtor under the Oklahoma Sales Tax Code. 68 O.S. § 1354

[2] The Commission filed Proofs of Claim Nos. 603 and 604 on August 15, 1990, and 605 and 606 on August 16, 1990. The Commission asserts entitlement under these claims to treatment as a priority and administrative creditor for sales and withholding taxes. In its Omnibus Objection to Proofs of Claim, Debtor objects to these claims. On January 23, 1991, the Commission filed Amended Proofs of Claim Nos. 617 and 618, which amended Claim Nos. 603 and 604.

The parties agree that the Commission has reduced all amounts listed in Claim Nos. 603, 604, 605, 606, 617 and 618 by sales or withholding tax collected, other than the amount of sales tax due Oklahoma under Sales Tax Permit No. 246600.

(1)(C).[8] The Debtor argues that Oklahoma's imposition of a tax on the gross receipts of tickets sold in Oklahoma for interstate route transportation violates the Commerce Clause. U.S. Const., Art. I, § 8, cl. 3.[9]

Prior to 1977, the United States Supreme Court held that,

> [i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). Thus, state taxation of transactions involving interstate commerce was not necessarily

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[8] 68 O.S. § 1354 (1)(C) reads in pertinent part:

(1) There is hereby levied upon all sales, not otherwise exempted in Oklahoma Sales Tax Code, Section 1350 *et seq.* of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

[9] Art. I, § 8, cl. 3 reads in pertinent part:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

regarded as a violation of the Commerce Clause. However, the Court also had ruled that any state tax levied for the expressed "privilege of doing business" in a state was a *per se* violation of the Commerce Clause. *See Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). In 1977, the Court abandoned the *per se* analysis in *Spector Motor Service* in favor of a four-part test to determine whether a challenged state tax on interstate commercial transactions withstands constitutional scrutiny, regardless of its statutorily expressed purpose. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

In *Complete Auto Transit*, the Court recognized prior decisions which held that such a tax does not violate the Commerce Clause if:

> the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

maintains a presence in Oklahoma to facilitate both intrastate and interstate ticket sales. Additionally, Oklahoma issues the Debtor sales tax permits to facilitate collection and payment of sales tax. Although the Debtor views its nexus with Oklahoma as *de minimis*, it has a sufficient nexus to the taxing state under *National Geographic* to satisfy the first part of the *Complete Auto Transit* test.

B. The tax must be fairly apportioned.

In 1989, the *Goldberg* Court held "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-261. *See*: *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). To determine whether the apportionment part of the *Complete Auto Transit* test is satisfied, the Court examines whether the tax is internally and externally consistent. *Goldberg*, 488 U.S. at 261. *American Trucking*, 483 U.S. at 284-285.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. *See*: *Container Corp.*, 463 U.S. at 169. The Debtor suggests the Oklahoma tax lacks internal consistency because other states may enact laws that tax the interstate portion of the tickets sold in Oklahoma. However, the *Goldberg* Court declared the proper standard for the internal consistency test to be comparison with an *identical*

tax, not a similar tax. *Goldberg*, 488 U.S. at 261. Therefore, each state could enact an identical tax without producing multiple taxation if it were levied against interstate route tickets sold only within its own state for transportation originating there. Under the *Goldberg* standard, the Oklahoma sales tax is internally consistent.

The external consistency test is satisfied if the State taxes only that portion of revenues from the interstate activity which reasonably reflects the in-state component of the interstate activity being taxed. *Goldberg*, 488 U.S. 262. *See*: *Container Corp.*, 463 U.S. at 169. In making a practical inquiry, the Court noted:

> [i]n previous cases we have endorsed apportionment formulas based on the miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State.

Goldberg, 488 U.S. at 264.[6] *See, e.g., Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948) (buses); *American Trucking*, 483 U.S. 266 (1987) (trucks);

[6] The *Goldberg* Court held that apportioning by mileage the electronic impulses of a telephonic transmission would create "insurmountable administrative and technological barriers."

Japan Line v. County of Los Angeles, 441 U.S. 434 (1979) (cargo containers); *Complete Auto Transit*, 430 U.S. 274 (1977) (motor carriers); *Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 (1954) (oil pipelines). In *Central Greyhound*, a case with similar facts, New York taxed the gross receipts from ticket sales for interstate routes out of New York. The *Central Greyhound* Court held that the New York tax would withstand a Commerce Clause challenge if it were apportioned by mileage traveled within New York. *Central Greyhound*, 334 U.S. at 663-664. The Court found that:

> [b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'

Central Greyhound, 334 U.S. at 663, *quoting*, *Freeman v. Hewit*, 329 U.S. 249 (1947).

The Commission argues that the sales tax is self-apportioning since Oklahoma does not tax interstate tickets sold for routes which originate outside of Oklahoma and terminate within Oklahoma. However, in this Court's view, the *Central Greyhound* analysis is controlling. By taxing the gross receipts from interstate route tickets, the Commission has taxed more than the in-state component of the interstate activity. Accordingly, section 1354(1)(C) is not externally consistent. The tax is not fairly appor-

tioned, and therefore, it fails the second part of the *Complete Auto Transit* test.

C. The tax must not discriminate against interstate commerce.

The Debtor argues that the identical four and one-half percent (4.5%) tax on interstate and intrastate tickets clearly discriminates against interstate commerce. In past cases, the Supreme Court has decided that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent or has the effect of unduly burdening interstate commerce". *Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Dep't of the Treasury*, 490 U.S. 66, 75–79 (1989).

Section §1354(1)(C) is applied to all common carriers. Therefore, this statute allocates the tax burden in a facially neutral manner.

To determine if a tax has a discriminatory intent, the *Amerada* Court considered whether the tax was motivated by an intent to confer a benefit on local industry at the expense of interstate commerce. *See also: Bacchus Imports v. Dias*, 468 U.S. 263 (1984), in which a Hawaiian tax exemption for fruit wine was found to promote the local pineapple-wine industry. It does not appear from these facts that § 1354(1)(C) was enacted to promote or benefit Oklahoma common carriers at the expense of out-state common carriers.

In *American Trucking*, the Supreme Court invalidated the imposition of unapportioned lump-sum annual taxes on the operation of trucks and truck tractors as discriminating against interstate commerce. Accordingly, an unapportioned tax discriminates against interstate commerce, except (as in *Goldberg*) where lack of apportionment can be justified by administrative burdens. Therefore, in failing the apportionment part of the *Complete Auto Transit* test, the Oklahoma tax discriminates against interstate commerce. Section 1354(1)(C) fails the third part of the *Complete Auto Transit* test.

D. The tax must be fairly related to the services provided by the State.

The fourth part of the *Complete Auto Transit* test requires that the tax be fairly related to the activities of the Debtor in Oklahoma. *Goldberg*, 488 U.S. at 266. This part "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Id.* at 267. In *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, the Supreme Court found that police and fire protection, mass transit service and public road maintenance provided by the State of Louisiana caused the tax to be related to the activities of Holmes in running retail stores and a mail order business in Louisiana. *Holmes*, 486 U.S. at 32. In this case, the Debtor receives police and fire protection, along with other public services, at the locations where it sells tickets and loads its buses. The Debtor also

receives benefit from police protection and public road maintenance on its Oklahoma routes. Therefore, the Oklahoma tax is fairly related to the business activities of the Debtor in Oklahoma.

IV.

Based on the foregoing, the Debtor is entitled to an order sustaining its objection on the grounds that the claim is for the payment of a tax on the gross receipts from the Debtor's sales of transportation over interstate routes which tax is levied in violation of the Commerce Clause of the Untied States Constitution.

Now, therefore, IT IS HEREBY ORDERED:

The objection of the Debtor to the claim of the Oklahoma Tax Commission is sustained.

Dated: 5/13/92

/s/ Dennis D. O'Brien
Dennis D. O'Brien
U.S. Bankruptcy Judge